SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ ~~1950~~ 1951

No. ~~454~~ X

GEORGIA RAILROAD & BANKING CO.,
Appellant,

vs.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

ROBERT B. TROUTMAN,
FURMAN SMITH,
Counsel for Appellant.

SPALDING, SIBLEY, TROUTMAN
& KELLEY,
Of Counsel.

INDEX

Subject Index

Table of Cases Cited

Statutes Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 454

GEORGIA RAILROAD & BANKING CO.,
Appellant,

vs.

CHARLES D. REDWINE, STATE REVENUE COMMISSIONER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT

As provided in Rule 12 of the Rules of the Supreme Court of the United States, appellant, Georgia Railroad & Banking Company, submits herewith its statement disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

Jurisdiction of the Supreme Court is sustained by Sec. 1253 of the Judicial Code (28 U. S. C. 1253).

The action in the District Court was an action for injunction required by Act of Congress to be heard and determined by a District Court of three judges and was in fact heard and determined by a District Court of three judges.

(b) Statutes of the State of Georgia, Validity of Which Is Involved

The statutes of the State of Georgia, validity of which is involved, are:

(1) Article I, Sec. 3, par. 3 of the Constitution of Georgia, adopted by amendment in 1945, as appears in Georgia Laws 1945, page 14, as follows:

> "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void."

(2) Chapters 92-61, 92-26, 92-27, 92-28 of the Georgia Code of 1933, and the Act approved January 18, 1938, set out in the Georgia Laws, Extra Session, 1937-1938, page 77 et seq., as amended by the Act approved 2-17-43, set out in Georgia Laws 1943, page 204 et seq., providing for the ad valorem taxation of railroad corporations. Said statutes provide in substance that all railroad corporations owning property in the State of Georgia shall be required to make return of said property to the Commissioner of Revenue for the purposes of ad valorem taxation, that said return shall show separately the value of such property located in each county, municipality and school district through which such railroad runs, that the governing authorities of such counties and municipalities shall certify to the Revenue Commissioner the rate of taxation applicable to such property, that the State Revenue Commissioner shall thereupon assess all of the property for state taxation at the rate fixed by the legislature and shall assess the property in each county, municipality and school district at the rate so certified, that the railroad shall thereupon pay to the State Revenue Commissioner the state tax

and pay to the proper authorities of each county and municipality the amount due to such county, municipality or school district, that if the railroad fails to pay any such tax the State Revenue Commissioner shall issue execution requiring the levying officer to levy upon and sell a sufficient amount of the property of the railroad and that if any such railroad fails to return its property the State Revenue Commissioner shall assess the same from the best information he can obtain.

Appellant contends that said constitution and statutes are, as against appellant, unconstitutional and void on the grounds that the same are contrary to Sec. 10 of Article I of the Constitution of the United States and contrary to the Fourteenth Amendment of the Constitution of the United States.

(c) Date of Judgment Sought to Be Reviewed and of Application for Appeal

The judgment dismissing the complaint for want of jurisdiction was entered August 10, 1949. Motion for rehearing and to alter and set aside said judgment was filed by appellant on August 19, 1949. By order entered October 3, 1949, the prior opinion was modified and the motion overruled. The petition for appeal was presented, and was allowed, October 6th, 1949.

(d) Statement Showing Jurisdiction

Appellant was chartered by special act of the legislature of Georgia approved December 21, 1833 (Georgia Laws, 1833, page 256 et seq.). Said Act provided:

"The stock of said company and its branches shall be exempt from taxation for and during the term of seven years from and after completion of said railroads or any one of them; and after that shall be subject to tax

not exceeding one-half percent per annum on the net proceeds of their investment."

In 1874 the legislature of Georgia passed an act levying ad valorem taxes on railroads. Appellant resisted the tax. The Supreme Court of Georgia, in *State of Georgia* v. *Georgia Railroad & Banking Co.*, 54 Ga. 423, held that the above provision was an irrevocable contract exempting the property of the railroad from tax except as provided therein and that the Act of 1874, as applied against appellant, was unconstitutional and void as impairing the obligation of that contract.

No further effort was made to tax the property of the railroad until 1902 when the State of Georgia, acting through its Comptroller General again attempted to levy a tax on the property of appellant. Appellant then brought the suit in equity in the Circuit Court for the Northern District of Georgia against William A. Wright, Comptroller General of Georgia.

That action was defended by the Attorney General of Georgia with the approval and direction of the Governor. The Attorney General not only resisted the injunction but affirmatively asked the court to consider and decide the questions involved in order that the defendant as an official of the State of Georgia might know and perform his official duty.

The Court, after hearing, held that the charter provision was an irrevocable contract preventing the taxation of the property of the railroad except as therein provided and entered a decree permanently enjoining the defendant from levying and collecting any tax against the property described in the decree except as provided in the charter.

Georgia Railroad & Banking Co. v. *Wright*, 132 Fed. 912.

That decree was appealed to the Supreme Court. The Supreme Court modified the decree by striking therefrom certain property, which had been acquired by the railroad in a subsequent merger and affirmed the decree as so modified (*Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420).

Thereafter, no effort was made to tax the railroad until 1945. At that time the State of Georgia adopted an amendment to its constitution providing:

> "All exemptions from taxation heretofore granted in corporate charters are declared to be henceforth null and void.".

Acting under authority of that section, appellee, State Revenue Commissioner, threatened to levy and collect taxes against the property of appellant railroad from 1937 to date. Appellant thereupon brought this proceeding in the District Court, to temporarily and permanently enjoin appellee, as a wrongdoer, from levying and collecting any taxes on the property of appellant contrary to the provision in its charter, on the grounds that the above quoted provision of the Constitution of Georgia, and the statutes of Georgia under which appellee purported to be acting, were unconstitutional and void in that they sought to impair the obligation of the contract contrary to Sec. 10 of Article I of the Constitution of the United States, and were contrary to the Fourteenth Amendment to the Constitution, and to carry out and enforce the prior decree of Court, as modified and affirmed by the Supreme Court.

A three-judge court was convened as provided in Sec. 2281 and Sec. 2284 of the Judicial Code. Defendant filed motion to dismiss. Plaintiff filed motion for judgment on the pleadings, or for summary judgment, or in the alternative for an interlocutory injunction. The three-judge court,

after argument, sustained the motion to dismiss and dismissed the petition on the ground that the action was against the State of Georgia within the prohibition of the 11th Amendment of the Constitution of the United States.

(e) Authorities Believed to Sustain Jurisdiction

Appellant believes that jurisdiction of the Supreme Court of this appeal is sustained by the following authorities:

28 U. S. C. 1253;
28 U. S. C. 2281;
28 U. S. C. 2284;
Query v. *United States*, 316 U. S. 486;
City of Cleveland v. *United States*, 323 U. S. 329;
Stirling v. *Constantin*, 287 U. S. 378;
Stratton v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10.

Sec. 1253 of the Judicial Code provides for direct appeal to the Supreme Court in actions required to be heard and determined by a District Court of three judges.

Sec. 2281 requires this action, brought to restrain the State Revenue Commissioner of Georgia from assessing and collecting a tax on the ground that the Constitution of Georgia and the statutes of Georgia under which he is purporting to act are contrary to the Constitution of the United States, to be heard and determined by a three-judge court. Sec. 2284 (5) specifically provides that an order dismissing the application for injunction must be entered by three judges. The Supreme Court so held in the case of *Stratton* v. *St. Louis Southwestern Railroad Co.*, 282 U. S. 10.

(f) **Authorities Showing Question Substantial**

(1) Action was not a suit against the State within the prohibition of the Eleventh Amendment.

Gunter v. *Atlantic Coast Line*, 200 U. S. 273.
Allen v. *B. & O. Railroad*, 114 U. S. 311.
Board of Liquidation v. *McComb*, 92 U. S. 531.
Looney v. *Crane Co.*, 245 U. S. 178.

(2) Defendant was bound by prior decree.

Gunter v. *Atlantic Coast Line*, 200 U. S. 273.
Deposit Bank v. *Frankfort*, 191 U. S. 499.
Sunshine Coal Co. v. *Adkins*, 310 U. S. 381.

This is true, even if the State was not a party, because the State defended the prior action.

Souffront v. *Campagne des Sucreries*, 217 U. S. 475.
Drummond v. *United States*, 324 U. S. 316.
United States v. *Candelaria*, 217 U. S. 432.

(3) Court had ancillary jurisdiction to enforce prior decree.

Gunter v. *Atlantic Coast Line*, 200 U. S. 273.

(4) Even without the prior decree, defendant should have been enjoined.

Wright v. *Georgia Railroad & Banking Co.*, 216 U. S. 420.

ROBERT B. TROUTMAN,
FURMAN SMITH,
Counsel for Appellant.

SPALDING, SIBLEY, TROUTMAN & KELLEY,
Of Counsel.

APPENDIX "A"

Opinion Dismissing Complaint for Want of Jurisdiction

This suit is another phase of litigation which has been presented to the courts by various proceedings, in various forms, for more than seventy years. Past litigation, and the present, centers around an exemption granted to the present complainant by an Act of the Georgia Legislature in 1833. Full reference to the facts and the questions ultimately involved need not be stated here except by reference to phases of the former litigation which are directly involved here, to-wit: State of Georgia v. Georgia Railroad & Banking Company, 54 Ga. 423; Georgia Railroad & Banking Company v. Wright, 132 F. 912; Wright v. Georgia Railroad & Banking Company, 216 U. S. 420; Georgia Railroad & Banking Company v. Musgrove, 204 Ga. 139, 49 S. R. 2d 26.

In the present proceeding the complainant proceeds against Charles D. Redwine, State Revenue Commissioner of Georgia, to enjoin the assessment and collection of ad valorem taxes which is alleged would be contrary to the provisions of complainant's legislative charter, and thus impair the obligation of the contract. The complainant also seeks to enforce against Redwine, Revenue Commissioner, a previous decree of this Court entered in the case of Georgia Railroad and Banking Company vs. William A. Wright, Comptroller General, in 1907. 132 F. 912 (supra).

The defendant has filed a motion to dismiss, presenting various questions, the one now primarily for determination asserting that the present suit is in effect one against the State of Georgia, and of which this Court has no jurisdiction because of the provisions of the 11th Amendment to the Constitution of the United States.

Complainant has moved for a judgment on the pleadings and for a summary judgment, and seeks to meet the attack of the defendant's motion upon the ground, principally, that as the result of participation by the Attorney General of Georgia in the former proceeding of 1907 the State waived its immunity from suit, and further, that the suit against

the public officer to restrain the enforcement of an unconstitutional Act is not a suit against the State within the provisions of the 11th Amendment.

It seems proper to first consider the effect of the former adjudication of this Court in its decree of 1907 which restrained the defendant from assessing or collecting any taxes contrary to the terms of that decree. If bound thereby, the effect of the decree would require that the threatened assessment and collection of taxes by the defendant be likewise now restrained. That proceeding adjudged the validity of the exemption now involved.

This former suit was between the present complainant, a corporation created under the laws of the State of Georgia, and "William A. Wright, a citizen of the State of Georgia." The defendant was represented by counsel who was the Attorney General of Georgia. He acknowledged service of the subpoena "William A. Wright, by John C. Hart, Attorney at Law and Attorney General for Georgia." However, the pleadings were signed merely by the named counsel as "Counsel for defendant" and the pleadings for the defendant were entered in the name of "William A. Wright" as an individual. However, the opinion of the Court designates the defendant as "William A. Wright, Comptroller General of the State of Georgia." These references have been made to show that there is no clear course of designation or conduct which would lead to the conclusion without doubt that the respective parties considered the suit one against Wright in his official capacity and as a representative of the State, or whether he was proceeded against as an individual, to restrain an illegal act threatened to be consummated under color of office.

Without regard, however, to whether the defendant was sued in his individual or official capacity, it is conceded that he was the official of the State charged with the assessment and collection of the taxes in question and, counsel for the complainant, relying upon the principle ruled in Gunter v. Atlantic Coast Line RR Co., 200 U. S. 273, contends that the State in that proceeding waived its immunity from suit by participation in behalf of the defendant by the Attorney General of Georgia, and the tacit adoption of the litigation by a subsequent Governor in his message to the Legis-

lature. To ascertain the validity of this contention it becomes necessary to determine the power of the Attorney General of Georgia, and perhaps of the Governor of the State also, to waive the immunity of the State from suit by participating in, or the utterance of statements concerning, litigation against a State officer which seeks to control his official acts. It is of course established that the State's waiver of immunity from suit, or its consent to suit, must be expressed by a statute. It becomes necessary then to consider the statutes of the State of Georgia.

The provisions of the statutes in effect at the time of the former suit, which more clearly than any other expresses the power of the Governor or Attorney General to consent to suit, are sections 23 and 220 of the Georgia Code of 1895, which provide:

Sec. 23. "When any suit is instituted against the State, or against any person, in the result of which the State has any interest under pretense of any claim inconsistent with its sovereignty, jurisdiction or rights, the Governor shall, in his discretion, provide for the defense of such suit, unless otherwise specially provided for."

Sec. 220. "It shall be the duty of the Attorney-General . . . to represent the State . . . in all civil and criminal cases in any court when required by the Governor."

As to suits against the Comptroller General, this officer was authorized "when the services of a Solicitor-General are necessary in collecting or securing any claim of the State in any part of the State, . . . to command the services of said Attorney-General in any and all of such cases. . . ."

It will be observed that this statute has reference to "collecting or securing any *claim* of the State," and not broadly to defense of suits against the Comptroller General.

It may be noted that these are mere general directions for legal representation and do not form specifically a part of the tax collecting machinery provided by the Georgia statutes as were the South Carolina statutes con-

sidered in the case of Gunter vs. Atlantic Coast Line RR Co., 200 U. S. 273. The construction of his powers and authority by the Attorney General, made without regard to pending litigation, throws some light, at least, upon the question. In an address on the "History, Powers and Duties of the Attorney General" by Honorable M. J. Yeomans, then Attorney General of Georgia, Report of the Georgia Bar Association 1937, in stating the things that the Attorney General of the State "may not do," among others, he said:

"1. He cannot consent for the state to be sued. I have been requested, on several occasions, to consent to a suit being brought against the State. The Attorney General has no such authority. Neither has any other State officer. A consent on the part of the State to be sued must be found in some legislative enactment."

To complete the picture, it should be stated that in his message to the legislature in 1908, then Governor Smith, but who was not Governor at the time the suit was instituted in 1904, considered the litigation as "between the State and the Georgia Railroad and Banking Company." It may be that the proceeding was considered by the parties, counsel, the Court and, while on appeal, by the Governor, as one against the State. Nevertheless, the State, as a Sovereign, when the point is properly presented and relied upon, has the right to attack the attempted waiver of sovereignty, or consent to suit, by officers not plainly authorized by statute to so subject the State to suit. In Ford Company vs. Department of the Treasury, 323 U. S. 459, 467, 468, 469, there is a clear holding to this effect. Indeed this proposition does not involve a mere matter of parties or privies, but goes directly to the right of the Sovereign to immunity from suit except where it has clearly consented thereto as a Sovereign. Strict enforcement of the rule is essential to prevent this essential attribute from being frittered away by assumed or even pretended waiver of the State's immunity from suit by officers not authorized to do so. The only safe rule in such an instance will appear to be that the only proper basis for declaring consent or establishing waiver must be

found clearly expressed in some constitutional or statutory provision directly relating to the subject matter involved. This is the basis of the holding in Gunter vs. Atlantic Coast Line Railroad, supra, which is confidently relied upon by the complainant in the present case. That decision, as appears therefrom, and from the construction given to it in two recent cases, Great Northern Ins. Co. vs. Read, 322 U. S. 47, 56, and Ford Company vs. Department of the Treasury, 323 U. S. 459, supra, is predicated upon the South Carolina statutes, which had reference to an action for the collection of the taxes then involved, and provided that the Attorney General "shall defend said action for and on behalf of the State." The marked difference between the statutes of the State of Georgia and the South Carolina statute just referred to, renders clearly inapplicable the decision in the Gunter case. In view of the provisions of the Georgia statute, and the primacy of sovereign immunity from suit now asserted, the language of the Supreme Court as to the waiver by individuals of constitutional rights seems apposite, that is that "'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" Johnson vs. Zerbst, 304 U. S. 464, citing Aetna Insurance Company vs. Kennedy, 301 U. S. 389, 393; Hodges vs. Easton, 106 U. S. 408, 412; Ohio Bell Telephone Co. vs. Public Utilities Commission, 301 U. S. 292, 307. See also, Glasser vs. U. S., 315 U. S. 60, 70.

It is true, as argued by the complainant, that following the decision in the Wright case in this Court, affirmed by the Supreme Court of the United States, no State officer for many years made any attempt to assess the charter lines of the defendant for ad valorem taxes. The decision in Gunter vs. Atlantic Coast Line Railroad, supra, gives some weight to this feature, and of course "Administrative construction by a state of its statutes of consent," is entitled to weight. Ford Company vs. Department of the Treasury, supra. The conclusive effect of such official inaction, however, is seriously undermined if not destroyed, by the action of the present complainant in instituting in the State Court in 1945 a proceeding against the State

Revenue Commissioner of the State of Georgia, first naming him defendant "in his representative capacity," but afterwards amending it to read as against the named individual "who is State Revenue Commissioner of the State of Georgia," and which was afterwards amended to substitute as a party his successors in office as State Revenue Commissioner, as defendants. In that proceeding, the 1907 decree of this Court was submitted as res adjudicata, as was also the decision of the Supreme Court of Georgia in State of Georgia vs. Georgia Railroad and Banking Company, 54 Ga. 423. In that proceeding the question was squarely presented by demurrer that the suit was "in reality a suit against the State of Georgia and the State of Georgia has not consented to be made a party to this action or for the action to proceed against it." The trial court overruled this demurrer, but its judgment was reversed by the Supreme Court with directions that the same be sustained, and the petition dismissed because patently a proceeding against the State without its consent. Musgrove vs. Georgia Railroad & Banking Company, 204 Ga. 139, 49 S. E. 2d 26. Appeal to the Supreme Court of the United States was dismissed: Georgia Railroad & Banking Company vs. Musgrove, 335 U. S. 900. The Supreme Court of Georgia expressly referred to the former litigation in this Court and directed attention to the fact that in that case the question of the State's consent to suit was not raised. The Gunter Case, supra, was cited in the decision and the Supreme Court of Georgia plainly did not consider the law of Georgia to be to the same effect as that of South Carolina there considered. The question of waiver and the construction of the effect of the former decree was directly presented, for a copy of the entire record of the Wright case in this Court and in the Supreme Court of the United States was attached as a part of the petition in support of the plea of res adjudicata and as an estoppel. This holding by the highest Court of the State of Georgia upon the identical issues now sought to be presented, that the proceeding was one against the State and therefore not maintainable without the State's consent, is more than an "administrative construction" and is a holding by every fair implication that the Georgia

statutes did not provide authority for the officers participating in the former litigation to waive the State's immunity from suit or evidence its consent. In these circumstances, the admitted inaction of the State officials for a long period of time is entitled to no compelling force in determining the effect of the participation by the State officers in the former litigation.

The present defendant urges the decision in the Musgrove case, supra, as res adjudicata upon the principle stated in 50 Corpus Juris Secundum, page 15, section 597, as follows: "Although it has been said that, when a cause has been once fairly tried, it should not be tried again, even if the parties are willing, it is nevertheles s a general rule that a party entitled to claim the benefit of a former judgment may waive or estop himself to assert such right. So, where a party . . . joins issue on the very questions settled by the judgment, or voluntarily opens an investigation of the matters which he might claim to be concluded by it, . . . he will be held to have waived the benefit of the estoppel, and the case may be determined as though no such former judgment had been rendered." In this case we find it unnecessary to explore this principle to its fullest extent as an application of res adjudicata. It nevertheless seems to be pertinent in determining the effect to be given to the provisions of the Georgia statutes and the circumstances surrounding the former litigation in this Court, as well as the inaction of the State officers since the rendition of the decree therein.

It is concluded that no sufficient showing is made that in the original proceedings in this Court the State waived its immunity from suit or became bound by the decree. The question is therefore open, and being now asserted in bar of the present proceeding, it must be sustained.

The complainant contends that even if the State be not bound, it is nevertheless entitled to proceed by the present action as ancillary to the original suit against the defendant successor in office of William A. Wright, the Comptroller General of Georgia, defendant in the original suit. Under the law of Georgia defendant, Redwine, as the State Revenue Commissioner of the State of Georgia, is in effect the successor in office of the Comptroller Gen-

eral. However, this question is immaterial, for as well demonstrated in Musgrove vs. Georgia Railroad and Banking Company, supra, the suit is in substance and direct effect an action against the State, and not maintainable without its consent when the point is properly presented, as it now is. In view of the well considered opinion and discussion by Mr. Justice Bell in that case, no further discussion on this point is necessary here, except by reference. Complainant contends that the true holding of the Georgia Supreme Court in the case just mentioned is that a proceeding for declaratory judgment would not lie. Even if this were true, the opinion is nevertheless sound and controlling upon the points here involved, but it must be borne in mind that as clearly appears, that proceeding was also one for an injunction, and as to this feature, substantially identical with the present proceeding.

For the reasons just stated, it is clear that the effort to enforce the prior decree, as well as the relief sought by the ancillary proceedings are both proceedings against the State, which are not permissible.

Complainant further contends that the 11th Amendment does not prohibit suits against a State official to enjoin the enforcement of a State tax law, or any other State law, contrary to the Constitution of the United States, and numerous authorities are cited in support of this contention. It of course must be conceded that in proper circumstances, and especially where there is involved no specific performance of a contract by the State, a suit against a State official to restrain illegal action, has been held not to be such a suit against the State as is prohibited by the 11th Amendment. It is not necessary to enter upon any extended discussion of the numerous adjudications which sustain the general proposition asserted by the complainant. There are adjudications which contain language, not directly controlling or involved in the case, to the effect that even where a contract of the State is involved, the assertion of restraint against the State official is not a suit against the State. However, none of these determines the particular point here involved, and that is, as clearly stated in In re Ayers, 123 U. S. 443, 502, a ruling which has not been departed from, that "A bill in equity for the specific

performance of the contract against the State by name, it is admitted could not be brought. In Hagood v. Southern, 117 U. S. 52 it was decided that in such a bill, where the State was not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the court was without jurisdiction, because it was a suit against a State.

"The converse of that proposition must be equally true, because it is contained in it: that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the State." As clearly pointed out in the decision in that case, the point to be borne in mind in applying the principle of the authorities is that a suit predicated upon a contract with the State, (the one in the present case alleged to be prescribed by the complainant's charter), by enjoining the act of an officer and to indirectly compel the specific performance of the contract, "by forbidding all those acts and doings which constitute breaches of the contract, must . . . be a suit against the State." The present suit is predicated upon the claim that the assessment and collection against its charter tax lines, as otherwise permitted by the statute, would constitute an impairment of the obligation of the *contract* so that the principle of the Ayers case is inescapably applicable, because to grant the relief here sought will require the State to comply with and perform its contract of exemption. In fact, there is no claim of unconstitutionality in the statute under which the

defendant threatens to proceed, but merely that *because of the contract,* such procedure would unconstitutionally impair the obligation of the contract. The State is the contracting party, and an injunction against its officer in this case would be merely an enforcement of the State's contract in a suit in which it has not consented to be sued. In re Ayers, supra, p. 503.

Therefore, the defendant official has in this case not merely urged the State's immunity as justification for his intended official acts,—he has established that the suit is in fact against the State.

The Gunter case referred to above involved a charter exemption from taxation. Its language that a suit against State officers to enjoin them from enforcing an unconstitutional tax was not a suit against the State within the prohibition of the 11th Amendment, was clearly not considered controlling upon the contract feature of the case, or else it would not have been necessary to determine what was considered the actual question involved, that is, whether the State had waived its immunity from suit. In the other adjudications cited by the complainant, there was either no express contract by the State involved, or this question was not considered controlling, or the point was not raised. So it may be stated that there is no opinion subsequent to the Ayers case, supra, which expressly, or by necessary implication, weakens its controlling effect.

Under our dual system of Government, recognition of the right and power of a State as a Sovereign, is of course essential and well understood. The importance of maintaining State sovereignty and immunity from suit in a proper case, as provided by the 11th Amendment, (the history of which need not be repeated here) is such that we have fully considered that question as here presented without regard to the ultimate merits of the contentions of the complainant as they are here, or may be hereafter, asserted when and if the State may itself move against the complainant in breach or avoidance of the contract of exemption from taxation provided in the complainant's charter. Thus, without any expression upon the ultimate merits of the case, but upon determination that the pro-

ceeding is in effect one against the State and prohibited by the 11th Amendment, we conclude that this Court is without jurisdiction of the present proceeding and that the motion of the defendant now urged in effect on behalf of the State, should be, and the same hereby is, sustained.

The complaint accordingly is dismissed for want of jurisdiction in this Court to entertain the same.

This the 29th day of July 1949.

Leon McCord, United States Circuit Judge; Robert L. Russell, United States District Judge.

Filed Aug. 10, 1949.

APPENDIX "B"

Dissenting Opinion

I respectfully dissent from the majority opinion in this case.

There is no necessity for my giving a lengthy statement of the facts in this case. Suffice to say that the State of Georgia for over seventy years has, by various procedures and various forms, been trying to vitiate or nullify this contract in question which is the basis of this suit under consideration. (City of Augusta Vs Georgia Railroad & Banking Company, 26 Georgia, 651, 662, et seq.; The State of Georgia Vs Georgia Railroad & Banking Company, 54 Georgia, 423; Goldsmith, Comptroller Sc., Vs Georgia Railroad & Banking Company, 62 Georgia, 485.)

Judge Newman of this court (Northern District of Georgia), on the 3rd day of July, 1907, decided the contract at issue between the State of Georgia, acting by and through its Legislature and Governor and The Georgia Railroad & Banking Company was a valid and binding contract. Judge Newman's decision was affirmed by the Supreme Court of the United States in the case of Wright, Comptroller, Vs The Georgia Railroad & Banking Company, U. S. Supreme Court 216, page 420.

The plaintiff in this case, The Georgia Railroad & Banking Company has filed a motion for judgment on the plead-

ings or for summary judgment. The defendant has filed a motion to dismiss. The majority of this court has decided to sustain the motion to dismiss for reasons as set forth in their decision. I am deciding in favor of a judgment on the pleadings or summary judgment as follows:

I believe this Court has jurisdiction because this action is an ancillary or supplemental bill to effectuate or enforce a prior decree of this court as hereinabove stated. (See also Root Vs Woolworth, 150 U. S. 201. Gunter Vs Atlantic Coast Line Railroad, 200 U. S. 273.) The State of Georgia is therefore before this court by reason of these decisions. Being before this court this action is merely, as stated above, simply an action to effectuate the prior decree of this court

I do not believe the case of Musgrove Vs The Georgia Railroad Banking Company, 49, S. E. 2d 26, cited by The State of Georgia and the majority of this court is applicable to this case, because that case merely decided the question of state practice and did not decide this particular federal question, or any other federal question.

The judgment of this court as affirmed by the Supreme Court of the United States is conclusive on the validity and effect of the contract of exemption not only as against the contentions actually urged in that case but as against all contentions that could have been urged. (See Gunter Vs Atlantic Coast Line, 200 U. S. 273; Deposit Bank Vs Frankfort, 191 U. S. 499; New Orleans Vs Citizens Bank, 167 U. S. 371; Montgomery Vs Thomas (C. C. A. 5), 146 F. (2d) 76; Leininger Vs Commissioner (C. C. A. 6), 86 F. (2d) 791.

Respectfully,

F. M. SCARLETT,
U. S. District Judge,
for the Southern District of Georgia.

July 29, 1949.